IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 43

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

## BRIEF FOR PETITIONER.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 975.

LESTER J. ALBRECHT,
Petitioner,

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The District Court entered judgment without an opinion on May 13, 1965 (R. 131-132). The opinion of the Court of Appeals for the Eighth Circuit, published at 367 F. 2d 517, is reprinted in the Record, pp. 145-159.

### JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 20, 1966 (R. 159). On November 7, 1966, the Court of Appeals stayed its mandate pending petition for certiorari (R. 160). This Court al-

lowed the writ on February 27, 1967 (R. 161). The jurisdiction of the Supreme Court rests on 28 U. S. C., Sec. 1254 (1).

## QUESTION PRESENTED.

Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent-merchant carriers in order to induce him to comply with its suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act.

## STATUTES INVOLVED.

Section 1 of the Sherman Act (26 Stat. 209; 50 Stat. 639; 69 Stat. 282; 15 U. S. C., Sec. 1), provides that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

Section 4 of the Clayton Act (38 Stat. 731; 15 U. S. C., Sec. 15), provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

## STATEMENT OF CASE.

This is a resale price maintenance case brought by a home delivery carrier against his newspaper supplier under Section 1 of the Sherman Act (R. 1-7). The complaint alleged that The Herald Company, sometimes hereinafter called the "Globe-Democrat", violated the antitrust laws by fixing and maintaining the prices at which independent contractors, called newspaper carriers, could resell The Herald Company's newspaper, the St. Louis Globe-Democrat, and by terminating its carrier relationship with the carrier Albrecht by means of and pursuant to an unlawful combination, or because of Albrecht's refusal to comply with the Globe-Democrat's resale price policy.

It was admitted by Defendant in its Answer that Plaintiff is an individual engaged in the business of operating a newspaper carrier route known as St. Louis Globe-Democrat Route No. 99 in the County of St. Louis, Missouri, since June 1, 1956 (R. 1, 10); that the Globe-Democrat Publishing Company, a Missouri corporation, was liquidated on December 29, 1963, and its assets and liabilities transferred to and assumed by Defendant, The Herald Company, a New York corporation, which is doing business as Globe-Democrat Publishing Company in the City of St. Louis, Missouri, and elsewhere, said business consisting of the publishing and selling of a daily newspaper known as "St. Louis Globe-Democrat" in said City and State, as well as outside of said State, and that Defendant is engaged in commerce as defined in Section 12 of Title 15, U. S. C. A., and is engaged in activities affecting commerce (R. 1, 2, 10).

It was further admitted in the Answer that Defendant and the Globe-Democrat Publishing Company for a long period of time prior to June 1, 1956, and up to the pres-

ent time, caused the St. Louis Globe-Democrat newspaper to be delivered to its subscribers in the Greater Metropolitan St. Louis Area by means of a system of carriers, and for the purpose of distributing and delivering its newspaper, divided said area into certain districts, commonly called routes, and has sold, given, or approved and authorized the sale to various paper carriers, including Plaintiff, of such routes, lists of subscribers within said routes, certain rights and privileges and the good will of the business of such newspaper carrier routes (R. 2, 10); that Plaintiff as the operator of Route 99 has, since June 1, 1956, and up to the time of the instant lawsuit, purchased St. Louis Globe-Democrat newspapers from Defendant at wholesale, without the right to return any newspapers so purchased, and sold said newspapers at retail to numerous customers within said Route, with whom Plaintiff had entered into separate agreements to deliver to each of them the St. Louis Globe-Democrat, and that from the time Plaintiff purchased said Route, he faithfully performed all of his duties as a carrier of Defendant's newspaper, promptly paid all monies due Defendant, and had established a substantial and profitable business (Par. 6, R. 3, 10).

It was further admitted in the Answer that Defendant and the Globe-Democrat Publishing Company (hereinafter sometimes referred to collectively as "the Publisher") have followed a practice for many years up to the present time, of publishing in its newspaper the Publisher's "suggested retail prices" for delivery by carriers of its newspapers to customers (Par. 7, R. 3, 10); and that the Publisher has followed the practice for many years up to the present time, of requiring that carriers of Defendant's newspaper sell the St. Louis Globe-Democrat to subscribers at prices no higher than the Publisher's "suggested retail prices" (Par. 8, R. 3, 11).

A count of tortious interference with business relations was dismissed before trial (R. 20, 141). The trial court denied plaintiff's motion for summary judgment on the issue of liability (R. 19). At trial the defendant did not controvert the facts, but won a jury verdict (R. 102, 131-132, 142). The trial court entered judgment on the verdict and overruled a motion for judgment n. o. v., or for a new trial (R. 131-132, 137-138). The Court of Appeals for the Eighth Circuit affirmed (R. 159) 367 F. 2d 517. This Court granted certiorari (R. 161).

Petitioner was, from June 1, 1956, to October 31, 1964, the home delivery carrier of the St. Louis Globe-Democrat newspaper on Route 99 in a suburban area comprising part of Kirkwood, Missouri (R. 1, 23, 48-49). He bought Route 99 from the previous carrier and sold to another that part of the Route remaining to him after the incidents involved in this suit (R. 22, 50-52).

Respondent is a corporation which publishes the St. Louis Globe-Democrat, a morning newspaper circulated in Illinois and Missouri by mail and by home delivery routes (R. 1-2, 82-83). Until 1961, the relationship between the newspaper and its home delivery carriers was regulated by a collective bargaining agreement (R. 53-54). On February 16 and 17, 1961, the Business Agent of St. Louis Newspaper Carriers' Union No. 450, wrote G. D. Bauman, Business Manager of the newspaper, advising him that the carrier contract would terminate May 26, 1961, and inviting negotiations for a new contract. On May 16, 1961, Mr. Bauman replied that on advice of counsel the newspaper took the position that home delivery carriers are not employees but independent merchants; that it could not negotiate with the carriers about the pricing policy, which must be determined unilaterally by it; that a threatened strike by the carriers would be considered by the newspaper to be a boycott by a group of merchants

and that redress would be sought by actions for treble damages under State and Federal antitrust laws (R. 53-55).

On May 26, 1961, the contract between the newspaper and the carriers' union expired and was not renewed (R. 54, 58).

In Mr. Bauman's letter of May 16, 1961, to the Business Agent of the carriers, and in a policy statement issued to all carriers and received by Petitioner, the newspaper stated that it would announce a suggested retail price to subscribers and if a carrier charged more it would refuse to sell newspapers to him, or would terminate his exclusive right to sell "the Globe-Democrat by home delivery in his territory," but he would be given 60 days within which to sell his route to a satisfactory carrier (R. 54, 60). The suggested retail price was published daily in an ad in the paper (R. 29-30).

Beginning in 1961, the newspaper increased its suggested retail price per month for home delivery of the daily paper from $1.30 to $1.60, and continued the $1.60 suggested price at all subsequent times. Petitioner charged his customers on home delivery Route 99 the suggested $1.60 price if they paid in advance, but otherwise, he charged $1.70 (R. 32, 33). He had few customers who paid in advance (R. 33).

In 1961, and again early in 1962, Walter I. Evans, the Circulation Director of the newspaper, telephoned Petitioner, saying that he had information that Petitioner was charging $1.70 rather than the suggested $1.60, and warning him that the newspaper could not tolerate that, and Petitioner would have to charge the suggested price (R. 34, 35). Petitioner replied that he was an independent merchant, received no pension or vacation payments from the newspaper as an employee would; and that he would set his own price (R. 34).

On June 1, 1962, Mr. Evans wrote Petitioner protesting his $1.70 price, and warning that if he persisted, "we will take whatever legal steps appear to be necessary to effectuate our position" (R. 35). Following receipt of that letter, Petitioner had a meeting with Circulation Director Evans and Business Manager Bauman in Evans's office, at which he was told that the newspaper would have to control the retail price; that they could not tell Petitioner what to charge, but if he charged more than the suggested retail price, they did not have to do business with him; and that Petitioner should not use a "bill" which had a price of $1.70 printed on it (R. 36-37). Petitioner continued to charge $1.70 for the daily paper (R. 38).

The Globe-Democrat was delivered to homes on 165 to 173 routes (R. 83-84). Throughout the period from May 26, 1961, when the Union contract expired, to May 20, 1964, the newspaper took no action against any of the home delivery carriers to secure compliance with its suggested retail price, except to contact carriers whose subscribers had called attention to the fact that they were charging more than the suggested price and request them to comply (R. 87). Over the three-year period prior to May 20, 1964, Petitioner lost about six subscribers as a result of charging $1.70 instead of the publisher's suggested $1.60 (R. 38). On May 20, 1964, Petitioner had 1,201 daily subscribers (R. 38).

On May 20, 1964, the newspaper sent Petitioner a letter, signed by Circulation Director Evans and composed with the assistance of Business Manager Bauman (R. 8, 97). The letter informed Petitioner that the newspaper had received and referred to him "a large number of complaints" from his customers that he was charging more than the publisher's suggested price, and continued:

> "The system we customarily follow of respecting, as exclusive, territories of our carriers prevents the

normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of over-pricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at retail ourselves, or for resale by another carrier, at the lower prices in the over-priced territory.

"In accordance with this policy, we are sending to each resident of your appointed territory the enclosed letter" (R. 8).

The policy statement referred to was first issued in 1959 with reference to independent news dealers. Bauman's letter of May 16, 1961, stated that it also applied to carriers. On May 24, 1962, it was reissued and made specifically applicable to home delivery carriers (R. 55-60). The territories were exclusive only as to other home delivery carriers. Petitioner, as well as other carriers, had competition within his route from store sales, street racks, and street corner salesmen, who also made some home deliveries (R. 26-27, 52, 72, 82).

The enclosed letter informed addressees that readers who subscribe "through Lester J. Albrecht, 634 North Harrison, Kirkwood, Missouri, an independent merchant, are being charged more for the Globe-Democrat than our suggested retail price." It further stated the amount of the suggested price, and invited completion and return of an enclosed card which would authorize the Globe-Democrat to make delivery at the suggested price. The letter was signed by Circulation Director Evans (R. 9, 10).

The letters were mailed out to the residents on Petitioner's route, and were followed by telephone and door-to-door solicitation by Milne Circulation Sales Corporation, under contract with the newspaper (R. 41-43, 61-70). This solicitation asked persons paying "the extra price"

if they wanted to "get the paper at the regular price" (R. 66). Milne had done circulation solicitation for the Globe-Democrat for 4 or 5 years, but had never based such solicitation on an inquiry as to the carrier's compliance with suggested retail price (R. 66). The Globe-Democrat had never taken this kind of action against any other carrier (R. 87). It had *no dissatisfaction* of any kind with Petitioner's performance of his services as a home delivery carrier, except his pricing (R. 88-89, 95-96). Business Manager Bauman said that he wished other carriers would perform their work as well as Petitioner (R. 96). The only reason for soliciting the customers of Petitioner by the described means was admitted by Evans to be to maintain the publisher's suggested retail price (R. 88).

The result of the solicitations was subjection of Petitioner to angry epithets, opprobrium and serious loss of income, with little decrease in expenses (R. 41-42). He lost more than 300 of his 1,201 daily customers (R. 41, 44-47). On June 12, 1964, nineteen days after the solicitations began, Petitioner lowered his price from $1.70 to the suggested retail price of $1.60, in order to keep his remaining customers (R. 45-46, 49).

The newspaper used makeshift means to make deliveries to the customers it had solicited away from Petitioner. It owned no equipment for home deliveries, and had no employees for this purpose (R. 84-87). It had not been in the carrier business; did not want to be in it and had no thought of making a profit from delivering to Petitioner's former customers (R. 84, 96-97). Temporarily, employees with other duties made the deliveries, using their personal cars (R. 91). Early in July, the newspaper advertised for a carrier to deliver to the customers it had taken away from Petitioner (R. 75). John Kroner, a carrier on another Globe-Democrat route, applied for and was

given the list of former customers of Petitioner on his Route 99, which was designated a new Route, with the number "198", although the newspaper had not more than 173 routes (R. 71-76, 83-84, 99-100). The right to serve these 300 customers was given to Kroner without charge (R. 72-73, 92, 99). Circulation Manager Charles B. Cleaver stated that he told Kroner he could have the profit of serving these customers; that it was uncertain how long he could deliver to them, that these customers had been taken from Albrecht for overcharging; and that he reminded Kroner of the newspaper's resale price policy (R. 99-101). Kroner testified he was told that he might have to give back the customers if Petitioner Albrecht sold "the route," or if "Albrecht got straightened out with the Globe-Democrat" (R. 76-77).

On July 27, 1966, Petitioner met with Business Manager Bauman, in his office. Bauman said the customers would be given back to Petitioner if he would agree to charge no more than the suggested retail price (R. 47, 96). Petitioner refused; saw his attorney, and this action was filed August 12, 1964 (R. 1, 47). On August 21, 1964, in a letter signed by Evans, the newspaper notified Petitioner "that your appointment as carrier is terminated," but he would be given 60 days to sell his route to a person whose credit, experience and efficiency was acceptable to it (R. 48-49). This period was subsequently extended from October 21 to October 31, to simplify billing, which is usually on a monthly basis (R. 49).

Eugene Schwarzenbach offered Petitioner $24,000.00 for Route 99 (R. 50). On September 15, 1964, Schwarzenbach and Albrecht met with Evans, Cleaver and Bauman to see if the publisher would approve the prospective purchaser. Bauman told Schwarzenbach that he would not be buying the 300 subscribers on Route 99 turned over to Kroner as "Route 198," and that new subscriptions 'phoned

in to the newspaper would be given to Kroner on "Route 198," unless Petitioner dropped the suit and bought back the customers from Kroner—in which case Petitioner could sell to Schwarzenbach or could operate it himself if he would agree to charge the suggested retail price (R. 50-51). After this meeting, Schwarzenbach agreed to and thereafter did purchase Petitioner's part of Route 99 for $12,000.00 (R. 51-52, Plaintiff's Exhibit 12, App. B). On December 1, 1964, Schwarzenbach bought the "Route 198" customers from Kroner for $3,600.00 (R. 80).

## SUMMARY OF ARGUMENT.

The undisputed facts clearly show that the Globe-Democrat, entwining with itself a circulation sales company, Albrecht's customers, and another home delivery carrier, brought pressure upon Albrecht to comply with its suggested resale price by means that went far beyond prior announcement and mere declination, and that this additional pressure did overcome Albrecht's independent judgment and cause him to comply.

The Court of Appeals' suggestion that the acts were not coercion because they were "legal competition" was not even seriously argued by the Globe-Democrat, and the facts overwhelmingly show that the Rest. of Torts, § 709 standard of bona fide competition was not met and this basis of immunity from tort liability is not available to the Globe-Democrat.

The undisputed facts clearly show that termination was for failure to agree to comply in the future with the Globe-Democrat's resale price arrangement. The arrangement being unlawful there can be no doubt that the termination was unlawful.

The Court of Appeals was in error in holding that the home delivery carrier business is outside the sweep of the general rule that price fixing, of a minimum price or a maximum price, is a *per se* offense.

The only question at issue is whether an unlawful combination in violation of Section 1 of the Sherman Act was created and maintained by the actions of the Globe-Democrat and the persons it entwined with it. If "common purpose" is a necessary element of "combination" it was present in the relationships between the Globe-Democrat, the circulation sales company, some of

Albrecht's customers, and the other carrier. However in resale price maintenance cases an unlawful "combination" can consist of an antagonistic-coercive relationship between the seller, not acting in agreement, concert, or common purpose with anyone, and the buyer. Such a "combination" is created, as a matter of law, whenever the seller goes beyond prior announcement and mere declination to sell and uses other means to effect adherence to his suggested resale prices. This is the law of the **Parke, Davis** case. This view of "combination" is absolutely necessary if the purpose of the Sherman Act is to be accomplished in resale price maintenance cases. The newspaper industry furnishes an example of the evil that would result from holding that "common purpose" is a necessary element of "combination."

The trial court erred in refusing to grant summary judgment, or judgment n. o. v. for Petitioner, and by including a requirement of "common purpose" in its jury instruction on "combination" and refusing to give instructions stating the **Parke, Davis** rule. The judgment below should be reversed and the court directed to enter judgment for Petitioner Albrecht on the matter of liability and hold a new trial to determine the amount of damages.

## ARGUMENT.

### I.

### The Undisputed Facts Clearly Show Coercion, Termination in Furtherance of Resale Price Maintenance, and Restraint of Trade.

The facts in this case as presented by plaintiff Albrecht were undisputed, and, in fact, largely admitted by the Globe-Democrat. The facts clearly show:

1. Resale price maintenance by coercion.
2. Termination for refusal to promise future compliance.
3. Restraint of trade.

#### 1. Resale price maintenance by coercion.

The Globe-Democrat wrote to Albrecht's customers and hired Milne Circulation Sales Corporation to telephone them and call on them door-to-door. The customers were told Albrecht was overcharging and were solicited to leave Albrecht and accept delivery from another at the newspaper's suggested retail price (R. 8-10, 41-43, 61-70). These actions forced Albrecht to capitulate. For three years Albrecht had held to his own price, although repeatedly advised and requested by the Globe-Democrat to reduce his price to its suggested price (R. 38). After the solicitations started on May 20, 1964, Albrecht held out for only 19 days. On June 12, 1964, he lowered his price from $1.70 a month for the daily paper to the suggested resale price of $1.60 (R. 45-46, 49). He had lost over 300 of his 1,201 customers as a result of the solicitations, in addition to being subjected to personal abuse (R. 41-42, 44-47).

The Court of Appeals said of the Globe-Democrat's actions that "there was no coercion other than providing legal competition" (R. 155, 367 F. 2d 517, 524). This was not even seriously argued by the Globe-Democrat, in the face of the overwhelming facts to the contrary. The well-established rule of law is that taking custom from another is exempt from liability only when done pursuant to good faith competition, as shown by intent to gain profits for oneself and to continue in business for oneself and not just temporarily in order to injure another. Rest. of Torts, Sec. 709; **Tuttle v. Buck** (1909), 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S. 599; **Package Closure Corp. v. Sealright,** 141 F. 2d 972 (C. C. A. 2, 1944). The fullest and most explicit admissions by the Globe-Democrat indicate that it had never been in the carrier business; did not want to be; had no equipment or employees for the carrier business; had no thought of making a profit from delivering to the customers it took from Albrecht; asserted no proprietary right in serving them; made delivery to them for only a short time on a make-shift basis and then gave them without charge to a carrier, Kroner, for whom it had advertised; and had the sole purpose of forcing Albrecht to comply with its suggested resale price (R. 71-76, 83-87, 91-97).

**2. Termination for refusal to promise future compliance.**

The 300 customers were given to Kroner on the understanding that he could serve them only temporarily and would have to give them back if Albrecht "got straightened out" with the Globe-Democrat (R. 76-77). On July 27, 1964, the Business Manager of the Globe-Democrat offered to return the 300 customers to Albrecht if he would agree to charge its suggested resale price (R. 47, 96). Albrecht refused and filed this suit on August 12, 1964 (R. 1, 47). The Globe-Democrat then terminated (R. 48-49). Officers of the newspaper said repeatedly that they

never at any time had any complaint about Albrecht except his pricing (R. 88-89, 95-96). On September 15, 1964, the Globe-Democrat told a prospective purchaser of Albrecht's route that he would not receive the 300 customers turned over to Kroner and would not receive new subscriptions telephoned in to the newspaper office, unless Albrecht dropped the suit and bought the customers back from Kroner—**in which case Albrecht was told he could continue to operate the route if he would agree to charge the suggested resale price** (R. 50-51).

At every point the Globe-Democrat was acting to maintain its suggested resale price. Respondent admitted that it and Milne Sales solicited the customers and potential customers of Albrecht because he was charging more than the Globe-Democrat's suggested retail price, and in order for the newspaper to maintain its suggested retail price (Admitted in Defendant's Answer, R. 11, and see R. 3, 4, 8-10, in Defendant's Answers to Interrogatories 14 and 15, R. 81, and in the admissions of Defendant's Circulation Director, Evans, at R. 87, 88, 92). The termination had this same purpose, and was explicitly used as a bargaining lever for resale price maintenance. It was well within the time period of coercion for that single purpose. Even after the Globe-Democrat advised Albrecht that he was terminated and that it would not sell him papers after sixty days, and when Albrecht came in to obtain the required approval of the newspaper of the proposed purchaser of his route, the Globe-Democrat still attempted to coerce Albrecht to resume delivering papers as the regular carrier on Route 99, provided he would drop his lawsuit against the newspaper and would charge no more than the newspaper's suggested retail price (R. 50, 51). Regardless of what rights a supplier has to terminate his dealings with a customer, he cannot legally do so for the reason that the customer will not comply with an unlawful arrangement. **Simpson v. Union Oil Co.**, 377 U. S. 13, 16.

Clearly, termination herein was unlawful where, as here, the Globe-Democrat's resale price maintenance activities constituted an unlawful arrangement.

3. **Restraint of trade.**

The Court of Appeals said that the facts do not show a restraint of trade because the newspaper's actions did not hinder but fostered competition (R. 152, 367 F. 2d 517, 522). There are no unique facts about the home delivery carrier business that would justify removing it from the pervasive sweep of this Court's rule that to fix a price is to restrain trade, without regard to the effect on competition or whether the price is held down supposedly for the benefit of the consumer. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211.

In the first place, the Court of Appeals assumed, quite incorrectly, that the home delivery carrier faced no competition within his route and but for the actions of the newspaper herein would be free "to mulct the public for all the traffic would bear" (R. 152, 267 F. 2d 517, 522). (For three years Albrecht had been charging 10¢ a month more than the suggested resale price.) The record clearly showed that Albrecht, as well as other carriers, had competition within his route from store sales, rack sales and street corner salesmen who also made some home deliveries (R. 26-27, 52, 72, 82).

Second, the Court of Appeals is quite wrong in its assumption that by the simple declination to sell, the newspaper would acquire the right to make home deliveries by its own employees and could become a complete monopolist on every route (R. 152, 367 F. 2d 517, 522). The routes are the property of the home carriers. The newspaper can decline to sell to the carrier, but the carrier still owns the right to deliver to the customers and he has the right to

sell the route even though he has been terminated (R. 54, 60). The newspaper would have to buy all the routes or else start from scratch as a genuine competitor in home delivery and work up its own customer list.

## II.

## "Common Purpose" Existed Among Those Entwined in Exerting Coercion.

The only question in this case is whether a "combination" in restraint of trade or commerce was created. Because the facts are undisputed, this is a question of law, and Rule 52 has no application. **United States v. Parke, Davis & Co.**, 362 U. S. 29, 44. The substantive rule to decide the question also is to be found in **Parke, Davis.** The issue is whether a resale price maintenance "combination" requires the presence of a third person acting in concert and common purpose with the seller.

Plaintiff Albrecht took the position that Milne Sales Corporation, and the 300 customers, and the other carrier, Kroner, knew the purpose of the Globe-Democrat's actions, and, therefore, did act in concert and common purpose with the seller, but that regardless of the presence of any third person or of his relationship to the newspaper a "combination" in violation of Section 1 of the Sherman Act came into existence as soon as the Globe-Democrat went beyond prior announcement and mere declination to sell, and used other means to bring pressure to bear upon Albrecht to get compliance with its suggested resale price.

Even if "common purpose" was required between the Defendant and third parties, it was present in this case. The admitted facts show, so clearly that reasonable men could not differ, that Milne Sales, Albrecht's customers and Kroner did have a common purpose, or common pur-

poses, with the Globe-Democrat, to coeree Albrecht to follow the Globe-Democrat's resale price policy.

(a) Milne Sales had never previously called existing home subscribers of the Globe-Democrat for the purpose of urging them to leave a carrier and accept delivery by other means at the suggested retail price (R. 66). In order to make this kind of solicitation Milne Sales had to know and did know that the Globe-Democrat was coercing Albrecht to comply with its suggested retail price (R. 65, 66, 68, 90). Mr. Evans, Circulation Manager of the Globe-Democrat, testified that he gave Mr. McDowell, of Milne Sales, the information contained in the letter of May 20, 1964, which contained an appeal to those customers to leave Albrecht and accept delivery by other means at the Globe-Democrat's suggested retail price (R. 90). A reasonable person making such a solicitation of the customers of the carrier must know that a natural and probable result of such solicitation will be to increase the coercion on Albrecht to comply with the Globe-Democrat's resale price policy. So knowing, Milne Sales made the solicitation. One is held to intend the natural and probable result of his actions. Therefore, Milne Sales did have a common purpose and engaged in a concert of action with the Globe-Democrat to coerce Albrecht to comply with the Globe-Democrat's resale price policy and, therefore, Milne Sales and the Globe-Democrat formed an unlawful combination in violation of Section 1 of the Sherman Act.

(b) Albrecht's customers receiving such solicitation, called him and complained, and many stopped taking the paper from Albrecht, accepting the Globe-Democrat's offer, sometimes communicated through Milne Sales, to deliver the Globe-Democrat to them by means other than Albrecht, at the suggested resale

price (R. 41-43, 45, 69, 88, 89). From the solicitation itself, these customers knew that the Globe-Democrat wanted Albrecht to charge no more than the suggested resale price. Knowing this, the customers called and complained, or refused to pay more than the suggested resale price and stopped taking the paper from Albrecht (R. 41, 42). Anyone in this situation would know that the natural and probable consequences of these actions would be to increase the pressure on Albrecht to comply with the Globe-Democrat's resale price policy. So knowing, the customers did the acts of complaining, refusing to pay more than the resale price, or cancelling their subscriptions with Albrecht. One is held to intend the natural and probable consequences of his actions. Therefore, these customers of Albrecht did have a common purpose and did engage in a concert of action with the Globe-Democrat to coerce Albrecht to comply with the resale price policies of the Globe-Democrat and, therefore, these customers formed an unlawful combination with the Globe-Democrat, in violation of Section 1 of the Sherman Act.

(c) George Kroner knew that he was given the customers taken from Albrecht by means of such solicitation, and that this solicitation had occurred because Albrecht was charging more than the Globe-Democrat's suggested resale price (R. 73, 75, 77, 92, 93, 100, 101). Kroner was told by Mr. Cleaver, the Globe-Democrat's Circulation Manager, that he would have to give these customers back when Albrecht "got straightened out with the Globe-Democrat" (R. 76, 77). Knowing this, Kroner delivered to the customers taken from Albrecht by such solicitation, and also delivered to customers who were "new starts" given him by the Globe-Democrat on the route which had been Albrecht's exclusively (R. 79). Any person

in this situation would know that the natural and probable consequences of these acts of delivering papers to customers taken from Albrecht and new starts within his exclusive route, which were withheld from Albrecht, would result in increasing the coercion on Albrecht to comply with the resale price policies of the Globe-Democrat. So knowing Kroner did deliver to the customers taken from Albrecht by solicitation and withheld from Albrecht, within the exclusive route of Albrecht (R. 78-80, 92-94, 100, 101). One is held to intend the natural and probable results of his actions. Therefore, Kroner did have a common purpose with, and did enter into a concert of action with the Globe-Democrat to coerce Albrecht and, therefore, Kroner and the Globe-Democrat formed an unlawful combination in violation of Section 1 of the Sherman Act.

## III.

## The Supreme Court Has Held That "Common Purpose" Is Not a Necessary Element of Combination.

Plaintiff Albrecht relied on the **Parke, Davis** opinion. Therein, this Court said that if a seller does no more than announce a policy designed to restrain trade, and then declines to sell to those who fail to adhere to the policy, he has not put together a combination in violation of the antitrust laws. If the customer yields to the bare threat to terminate, the restraint of trade sought to be prevented is accomplished, but that result must be tolerated so "long as **Colgate** is not overruled." But "[w]hen the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of

the Sherman Act." 362 U. S. 29, 44. This statement implies that there is no need for concerted action by the manufacturer together with a third person who shares a common purpose. It says if "he" goes beyond prior announcement and mere declination "he" has put together an unlawful "combination." The necessary implication is that the other party to the combination is the unwilling and coerced customer.

The Court of Appeals for the Fourth Circuit clearly adopted this meaning in **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (1963). Explaining why a concerted action or common purpose is not necessary to a finding of unlawful combination under Section 1 of the Sherman Act, the Court declared:

> "There is no indication in **Parke, Davis** or in any other case, that these principles regarding refusal to deal vary, depending upon whether there is a **monopoly** or **concerted action** with **co-conspirators**, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, **irrespective of monopoly or conspiracy**, if the seller **pressures** his customers or dealers into adhering to resale price maintenance or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself out of the narrow protection afforded by **Colgate**" (Emphasis added). 324 F. 2d 566, 573.

The trial court herein overruled plaintiff's motion for summary judgment (R. 19) and overruled plaintiff's objection to a requirement of "common purpose" in the definition of "combination" and refused to give Plaintiff's Requested Instructions 25, 26 and 27, which were in the language of the **Parke, Davis** opinion (R. 113, 119-120, 126). The District Court instead instructed the jury at R. 126 that:

"* * * in order to have a combination **there must be a common purpose** either to accomplish an unlawful act by lawful means or to accomplish a lawful act by unlawful means * * *" (Plaintiff objected to this charge at R. 113).

The Court of Appeals affirmed, saying:

"Combination is usually defined as the union or association of two or more persons for the attainment of some common end. Globe-Democrat did not combine with anyone. Its action taken to provide competition to plaintiff was completely unilateral" (R. 154, 367 F. 2d 517, 523).

All other Courts of Appeals that have considered the question have held that an unlawful combination can consist of the seller and his coerced customer, without any necessity for a third party who joins the seller in concerted action and common purpose. **Englander Motors, Inc. v. Ford Motor Co.**, 267 F. 2d 11 (C. A. 6); **George W. Warner & Co. v. Black & Decker Mfg. Co.**, 277 F. 2d 787 (C. A. 2); **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (C. A. 4); **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459 (C. A. 9). In the **Osborn** case, the Fourth Circuit said:

"It is clear . . . that if the seller imposes a trade restraining arrangement upon his customers, whether they be willing or reluctant, the seller has acted outside the protection of Colgate. Contrary to the theory adopted [by the court below] in the instant case, there need not be a concert of action among several sellers, or a conspiracy between the seller and customers who actively assist the seller in securing adherence to his policy of suppressing competition. **If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient.**" 324 F. 2d 566, p. 574, n. 13 (Emphasis supplied).

## IV.

**The View That the Antagonistic-Coercive Relationship Between Buyer and Seller Can Constitute an Unlawful "Combination" Is Essential to Effecting the Purpose of the Sherman Act in Resale Price Maintenance Cases.**

The view that an unlawful "combination" under Section 1 of the Sherman Act can consist of the coercing seller and his coerced customer whose will to charge his own price has been overcome has been adopted by this Court because it is the only view that will carry out the purposes of the Sherman Act in resale price maintenance cases. The genesis of competition is the competitive decision. Each economic entity should make production, distribution and pricing decisions on the basis of receiving the greatest benefit for itself in light of its own conditions of cost, location and market acceptance. These independent business decisions result in alternatives being presented to the consumer. The consumer's choices, based on securing the greatest benefit for himself, create the great pressure for economic efficiency that is the strength of the free market system.

If the flow of competitive decisions is threatened the whole system is in danger. The antitrust laws protect the free market system by prohibiting actions that seriously interfere with the flow of competitive decisions. The interference can result from voluntary renunciation by those who seek to benefit not through individual success in competition but through sharing in the fruits of price fixing or market division. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150; **United States v. Addyston Pipe and Steel Co.**, 6 Cir., 85 F. 271, aff'd 175 U. S. 211. The interference can result from depriving others of the right to make certain decisions, as in tying,

or all decisions, as in exclusion through monopolizing. **Northern Pacific Railway Co. v. United States,** 356 U. S. 1; **Standard Oil Co. of New Jersey v. United States,** 221 U. S. 1.

In resale price maintenance cases the facts show that some wholesalers and retailers sometimes voluntarily renounce their competitive pricing decision in the hope of monopoly profits, but others will not voluntarily renounce and are brought into line by the seller's depriving them of their independent pricing decision by a system for inflicting penalties that overcome the buyer's will. The voluntary renunciation is an easy case, but it is difficult to bring the deprivation case under Section 1 of the Sherman Act if all its categories of acts in restraint of trade—contract, combination, conspiracy—include an element of agreement, express or implied, or of concerted action for a common purpose.

The difficulty did not arise in the first resale price maintenance case to come before the Supreme Court. **Dr. Miles Medical Co. v. John D. Park & Sons,** 220 U. S. 373, was a suit by the drug manufacturer against a wholesaler who had been cut off for price cutting and who was obtaining supply from other wholesalers and from retailers by inducing them to breach resale price fixing contracts which they had voluntarily entered into. The suit was for an injunction to prevent tortious interference with contractual rights. The Supreme Court held that the demurrer was correctly sustained because the contracts were void because illegal under Section 1 of the Sherman Act. The relationship created by voluntary renunication of the buyer's independent pricing decision and his willing entry into the price fixing contract was in issue. The relationship between the drug manufacturer and the wholesaler who was refused service because of price cutting was not in issue. 220 U. S. 373, at 381-382.

The next resale price maintenance case to reach this Court squarely raised, on its facts, the question of whether a combination in violation of Section 1 of the Sherman Act could arise from the deprivation of a buyer's independent pricing decision by coercive acts of the seller alone. **United States v. Colgate & Co.**, 250 U. S. 300. It was not alleged that any contracts were entered into by the soap manufacturer and its customers; or that the defendant acted in concert with other soap manufacturers, or with other than its own customers individually; or that the customers themselves entered into any combination or agreement with each other, or that the defendant acted with them other than individually. 253 Fed. Rep. 522, 524, 527. The manufacturer alone was indicted and was charged with knowingly and unlawfully creating and engaging in a combination with its wholesale and retail dealers to procure their adherence to its suggested resale prices in violation of Section 1 of the Sherman Act. 253 Fed. Rep. 522, 523.

The combination was alleged to have been formed and carried out by the following acts:

> (1) Distributing telegrams, lists, etc., of uniform resale prices; (2) urging the dealers to adhere to those prices; (3) informing them that defendant would refuse to sell to those who did not so adhere; (4) requesting them to inform it of sales at other prices; (5) discovering and investigating sales of that character; (6) placing the names of dealers who made such sales on "suspended lists"; (7) requesting those dealers to give assurances and promises to adhere in future to the indicated prices; (8) refusing to sell to those dealers until they gave such assurances and promises; (9) selling to such dealers upon their giving such assurances and promises; (10) requesting such assurances and promises from new dealers when opening accounts; and (11) freely sell-

ing to those dealers who observed the indicated prices. 253 Fed. Rep. 522, 523.

The question so clearly raised by the facts in **Colgate** was not answered in the decision of that case. It was 1918 when the case was decided below and 1919 when it was decided by the Supreme Court. The prevailing attitude in the country was not averse to the concentration of decision making in the hands of the few. In 1920 this Court decided that a company that brought approximately 180 independent concerns under its control, extending to 80 per cent or 90 per cent of the steel production of the entire nation, was not in violation of Section 2 of the Sherman Act. **United States v. United States Steel Corp.**, 251 U. S. 417.

On a demurrer to the indictment the trial court in **Colgate** held that it did not charge a criminal offense under Section 1 of the Sherman Act. The Supreme Court by means of its reading of the trial court's interpretation of the indictment affirmed on the narrow ground that: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of the trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U. S. 300, 307. Attention was shifted from deprivation of the buyer's "independent discretion" to price to the seller's independent discretion to select his customers.

**Colgate** left unanswered the question of whether some kinds of actions by the seller alone can create an unlawful combination if those actions deprive the buyer of his independent price decision. The question was unequivocally answered by this Court in **United States v. Parke, Davis & Co.**, 362 U. S. 29. In the opinion of the

Court in **Parke, Davis,** Justice Brennan delineates the difficulty the Court had, in the resale price maintenance cases subsequent to **Colgate,** in giving up an exclusively consensual or conspiratorial rationale of Section 1 in the face of increasingly flagrant sets of facts of seller enforcement systems that overcame the will of the buyer and coerced him into combining with the seller by charging the dictated price. 362 U. S. 29, 39-43. The consensual or conspiratorial rationale finally had to yield to reality, and the **Colgate** doctrine of customer selection was limited to implementation only by prior announcement and mere declination. Any other conduct to secure resale price adherence was declared to be illegal—even if the other acts which secured adherence were wholly unilateral and not done in concert, common purpose, or agreement with others.

> Thus, whatever uncertainty previously existed as to the scope of the **Colgate** doctrine, **Bausch & Lomb** and **Beech-Nut** plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance *agreement,* express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. 362 U. S. 29, 43.

The gasoline and TBA cases clearly show the wisdom of adopting an antagonistic-coercive rationale of "combination" in resale price maintenance cases. In **Simpson v. Union Oil Company of California,** 377 U. S. 13, resale price maintenance was accomplished by the supplier. In form, the retailer was obligated by a consignment contract. In actuality his signature on the contract and any

adherence he gave to suggested resale prices were both obtained by the overwhelming economic coercion of the large oil company. Union Oil did not agree or conspire with other oil companies, or with other retailers, or with any other persons, but acted wholly by itself in coercing the retailer. But the resale prices, when the coercion was effective, were the result of the combined actions of the supplier in coercing and the retailer in knuckling under and complying. The relationship is antagonistic and coercive, not consensual or conspiratorial. There is no common purpose, no voluntary concert of action. If the coercion is lifted the retailer ceases to adhere and exercises his own independent pricing judgment. The formality of a contract, also induced by the coercion, is meaningless. The result should be no different if the contract did not exist. The Ninth Circuit and the Fourth Circuit were right in holding that unlawful combinations can exist between gasoline suppliers and their retailer customers when no contracts, express or implied, have been entered into. **Lessig v. Tidewater Oil Co.**, 327 F. 2d 459 (C. A. 9), cert. den. 377 U. S. 993; **Osborn v. Sinclair Refining Co.**, 324 F. 2d 566 (C. A. 4).

The antagonistic-coercive view of "combination" in Section 1 of the Sherman Act is absolutely essential to carrying out the purpose of the Act in resale price maintenance cases. The flow of competitive decisions must be preserved. The important competitive decisions in these cases are the pricing decisions of the buyers—as is clearly indicated by the ingenuity and vigor of sellers' efforts to shut them off. The flow of buyers independent pricing decisions can not be preserved if "combination" requires agreement, express or implied, or voluntary concert of action for a common purpose. If this view prevailed it is all too clear what would happen. Every seller could whip his customers into line on resale prices by the most vicious economic coercion so long as he did not act in concert

with a third person and did not force the customer to sign a resale price contract. The actions of the Globe-Democrat herein must be held to have created, as a matter of law, an unlawful "combination" in violation of Section 1 of the Sherman Act regardless of whether the persons it entwined in those actions shared a "common purpose" with the Globe-Democrat.

## V.

## The Newspaper Industry Shows the Evil That Would Result From Requiring "Common Purpose" as an Element of "Combination".

A specific example of the destruction of the competitive system that would result if "combination" were held to require an element of "common purpose" can be seen in the facts of this case and of the newspaper industry. Newspapers have a more compelling reason than humanitarian concern for the consumer to want to hold down resale prices. Newspapers sell readers to advertisers. **Times-Picayune Pub. Co. v. United States,** 345 U. S. 594, 613. The more readers, the higher the lineage rate for advertising. This is the reason why newspapers want to control the retail price. Before 1961, the St. Louis newspapers had every right to control retail price because the newspaper made the sale and delivered its papers through its own employees who were members of St. Louis Newspaper Carriers' Union No. 450. In 1961, the defendant herein, the Globe-Democrat, and the other St. Louis newspaper, ended all employer obligations to the home delivery carriers, such as unemployment insurance, workmen's compensation, paid vacations and other benefits by refusing to renew the collective bargaining contract and taking the view that the carriers were independent merchants (R. 53-58). Every newspaper in the country has sole control over whether carriers are employees or independent mer-

chants, by virtue of the National Labor Relations Board rule. If the publisher reserves control over manner and means, carriers are employees; but if he reserves control only as to result sought, they are independent merchants. **Lindsay Newspapers, Inc.**, 130 N. L. R. B. 680, aff'd. 315 F. 2d 709.

If a newspaper can induce a carrier's customers to call him a cheat and thief, to curse him out over the 'phone and move away from him in church (R. 41-42); to arrange with a third party, Milne Circulation Sales Corporation, to solicit his customers because he is "overcharging" and thus take away one-fourth of his customers, and withhold them by turning them over to another carrier; terminate him when he sues for relief and refuses to comply with the suggested resale price; and all the time use the hardship it has caused as a lever to get adherence to its resale price; and still not be in violation of Section 1 of the Sherman Act so long as it does not act in common purpose with any third persons, every newspaper in the country could use this means to avoid paying carriers decent wages as employees and, at the same time, prevent them from making the profit necessary to enable them to stay in business and provide good service to the subscribers. Such a situation could only lead to pressures destructive to the economic system.

## CONCLUSION.

In the case at bar an unlawful combination in violation of Section 1 of the Sherman Act came into existence as a matter of law the instant defendant went beyond prior announcement of its suggested resale price and mere declination to sell to Albrecht for non-compliance, and began to bring pressure upon Albrecht to overcome his independent business judgment. As a matter of admitted fact, defendant engaged in many acts that went beyond the

permissible limits which did cause the adherence of Albrecht to the Globe-Democrat's suggested resale price. Termination was for refusal to comply with the unlawful resale price maintenance arrangement. The facts were not controverted by the Globe-Democrat. Albrecht was entitled to prevail on his motion for summary judgment on the matter of liability, or later on his motion for judgment n. o. v.

Petitioner respectfully prays the Court to reverse the decision below and direct that judgment be entered for Petitioner Albrecht on the matter of liability and a trial be had on the amount of damages resulting from the unlawful solicitations and the unlawful termination.

Respectfully submitted,

By .....

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State of Missouri, }
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I, Donald S. Siegel, co-counsel for the Petitioner herein, and attorney of record for Petitioner in the Courts below, state that on the 24 day of August, 1967, I served 2 copies of the foregoing Brief for Petitioner on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Messrs. Hocker, Goodwin & MacGreevy, Attorneys of Record for the Respondents, in care of their office, 411 North Seventh Street, St. Louis, Missouri 63101.

By .....
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Member of the Bar of the United States Supreme Court.